UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JOHNSON CONTROLS, INC.
Respondent

and **CASE 10-CA-151843**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL UNION NO. 3066
Charging Party

and

BRENDA LYNCH and ANNA MARIE GRANT
Intervenors

Scott C. Thompson, Esq., Jordan Wolfe, Esq., **and** ***John Evans, Esq.***, for the General Counsel.
Shira T. Roza, Esq.*, of Detroit, MI, for the Charging Party.*
Mark M. Stubley, Esq. **and** ***H. Ellis Fisher, Esq.*** ***(Ogletree Deakins Nash Smoak)***, of Greenville, SC, for the Respondent.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. During the term of a collective-bargaining agreement, and in a context free of unfair labor practices, the Respondent received a disaffection petition signed by more than half of the bargaining unit employees. Even though some of the petition signers later signed union authorization cards, their testimony established that they remained opposed to union representation. After the contract expired, the Respondent lawfully withdrew recognition because the Union no longer enjoyed majority support.

PROCEDURAL HISTORY

This case began on May 8, 2015, when the Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and its affiliated Local Union No. 366 (collectively referred to herein as the Union), filed an unfair labor practice charge against the Respondent, Johnson Controls, Inc., with Region 10 of the National Labor Relations Board. The Region docketed the charge as Case 10-CA-151843 and began an investigation.

On August 31, 2015, the Regional Director for Region 10, acting pursuant to authority delegated by the Board's General Counsel, issued a Complaint and Notice of Hearing in this matter. Respondent filed a timely Answer.

On November 16, 2015, a hearing opened before me in Florence, South Carolina. At the hearing, I granted the petition of two of Respondent's employees, Brenda Lynch and Anna Marie Grant, to intervene.

The parties called witnesses and introduced evidence on November 16, 17, and 18, 2015. All of the witnesses testified in person at the hearing, as is customary in Board proceedings. Respondent also sought to call, by videoconference, a witness who was on active military duty and therefore unable to come to the courtroom. However, technical problems frustrated this attempt.

After the Respondent rested, I adjourned the hearing until January 19, 2016, when it would resume by telephone so that the attorneys could present oral argument. During this recess, the Respondent would have another opportunity to call the unavailable witness by videoconference which counsel, the court reporter and I could "attend" using our individual computers.

During an off-the-record conference call with all counsel on December 28, 2015, I directed that the hearing would resume on January 13, 2016, by videoconference so that Respondent could call and examine the previously unavailable witness. At this point, the General Counsel objected to the videoconference on the basis that the witness no longer would be on active military duty on January 13, 2016, and therefore would be available to testify in person.

The Respondent stated that the testimony of this witness largely would be corroborative and estimated it would take about 15 minutes. Requiring counsel and the court reporter to return to Florence for one-quarter hour of testimony would have entailed costs which, I concluded, would have outweighed the potential benefit of seeing the witness face-to-face rather than on a computer screen. Therefore, I overruled the objection.

On January 13, 2016, the hearing resumed by videoconference to take the testimony of the one witness. Subsequently, the Respondent provided a DVD recording of the testimony, which I have received into the record and reviewed.

On January 19, 2016, the hearing resumed by telephone conference call. After all parties presented oral argument, the hearing closed.

ADMITTED ALLEGATIONS

Based on the admissions in Respondent's answer, I find that the General Counsel has proven the allegations in complaint paragraphs 1, 2, 3, 4, 5(a), 5(b), 7, and 9. Additionally, Respondent's answer admits some of the allegations raised in complaint paragraphs 8(a) and 8(b).

More specifically, I find that the Charging Party filed and served the unfair labor practice charge as alleged. Further, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act), and that it is appropriate for the Board to assert jurisdiction.

Further, I find that at all material times, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and its affiliate Local Union No. 3066 have been labor organizations within the meaning of Section 2(5) of the Act.

Moreover, I find that the following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Section 9(b) of the Act:

> All Production and Maintenance employees at its facility located at 3046 Bill Crisp Road, Florence, South Carolina for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment covered by this Agreement. Whenever used in the Agreement, the word "employee" shall mean any person employed in the unit as defined by the National Labor Relations Board, Case No. ll-RC-6736 in the Certification of Representative, but excluding all other employees such as but not limited to Supervisors, Professional Employees, Guards, Office Employees, employees whose duties are of a confidential nature, and any excluded employee as defined in the Labor Management Relations Acts of 1947, as amended

The Respondent's answer admits that from August 18, 2010, to May 7, 2015, the Union was the designated bargaining representative of employees in the Unit and their exclusive representative pursuant to Section 9(a) of the Act. I so find. The Respondent denies that the Union remained the exclusive representative after May 7, 2015. That issue will be discussed below.

The Respondent's answer also admits, and I find, that on April 22, 2015, the Union requested to engage in bargaining for a successor collective-bargaining agreement. The Respondent further admits, and I find, that Respondent withdrew recognition from the Union on May 8, 2015.

Legal Principles

Labor law extends to the workplace some of the same principles which guide other human interactions, but tailors and adapts them to the unique relationships of employer, union and employee. One such principle underlies the caselaw relevant here.

Typically, once someone's status as representative or agent has been established, unless there is some new circumstance casting doubt on that authority, he does not have to keep proving it over and over again. For example, a judge ordinarily does not keep asking a lawyer whether she really is this particular client's attorney.

In labor law, this general sense of what is appropriate and helpful, and what is not, leads to very important and specific rules which further the Act's purpose, "removing certain recognized sources of industrial strife and unrest, *by encouraging practices fundamental to the friendly adjustment of industrial disputes*. . .and by restoring equality of bargaining power between employers and employees." 29 U.S.C. Section 151 (emphasis added). In other words, the rules further the stability of collective bargaining relationships and thereby promote the flow of commerce.

One of these rules concerns when an employer may withdraw recognition from an incumbent union representing a bargaining unit of its employees. In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board overruled a previous line of cases and established the principle applicable here:

> [A]n employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. Under our new standard, an employer can defeat a postwithdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.

The Board's decision to overrule *Celanese Corp.*, 95 NLRB 664 (1951), meant that an employer no longer could justify its decision to withdraw recognition from a union by producing evidence which only proved it had bonafide reasons to doubt the union's continuing majority status. The *Levitz* decision, which imposed the more stringent "actual proof" standard, furthered the purposes of the Act because an ongoing collective-bargaining relationship constitutes one of the "practices fundamental to the friendly adjustment of industrial disputes" which Congress intended to encourage. If a mere uncertainty about a union's majority status sufficed to end a collective-bargaining relationship, then a significant part of the statutory framework would be built of straw rather than brick. In *Levitz* the Board stated:

> We find no basis in either the language or the policies of the Act to warrant withdrawing recognition from a union that has not actually lost majority support. Indeed, we find that allowing withdrawal of recognition from unions that enjoy majority support undermines the Act's policies of both ensuring

employee free choice and promoting stability in bargaining relationships.

333 NLRB at 723. Under the policy announced in *Levitz*, an employer itching with doubt about whether its employees supported the union can relieve that uncertainty by requesting the Board to conduct a secret ballot "RM" election. Thus, in *Levitz*, the Board further held:

> While adopting a more stringent standard for withdrawals of recognition, we find it appropriate to adopt a different, more lenient standard for obtaining RM elections. . .we shall allow employers to obtain RM elections by demonstrating reasonable good-faith uncertainty as to incumbent unions' continued majority status.

Id. The privacy of the voting booth and the Board's neutrality make such a Board-conducted election the gold standard for determining employee sentiment. However, an employer may withdraw recognition from a union based on other evidence if that evidence actually proves the loss of majority support. In *Levitz*, the Board stressed that an employer relying on such evidence bears the risk should it turn out to be insufficient:

> An employer with objective evidence that the union has lost majority support - for example, a petition signed by a majority of the employees in the bargaining unit - withdraws recognition at its peril.

333 NLRB at 726.

However, even when an employer has enough evidence to prove that the union has lost its majority support, it is not always free to withdraw recognition. For example, a union's majority status may not be questioned during the life of a collective-bargaining agreement, up to 3 years. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996).

If an employer, during the term of such a collective-bargaining agreement, receives proof that a majority of bargaining unit employees no longer supports the union, it may announce its intention to withdraw recognition after expiration of the contract. However, it must continue to recognize the union while the contract is in effect.

In determining whether an employer lawfully withdrew recognition, the Board considers whether a majority of employees supported the union *at the time of withdrawal*. Even though the employer may have announced its intent to withdraw recognition months earlier, the actual withdrawal of recognition does not occur until after the agreement has expired. The extent of employee support for the union at this point, when the withdrawal of recognition becomes effective, determines whether the withdrawal was lawful.

In *Parkwood Developmental Center*, 347 NLRB 974 (2006), the employer and the union had entered into a collective-bargaining agreement which expired on March 8, 2003. Three months earlier, during the contract's term, the employer announced that it had received proof that a majority of bargaining unit employees no longer supported the union, and that it would cease to recognize the union after the contract's expiration. During the 3-month period

between the employer's announcement and the contract expiration date, the union asked employees to sign a petition authorizing the union to act as their bargaining representative. The signatures on this petition established that a majority of unit employees did support the union at the time the employer withdrew recognition, making that withdrawal unlawful. The Board rejected the employer's argument that the relevant point was in December rather than in March when the contract expired:

> In its exceptions, the Respondent contends that it actually withdrew recognition on December 2, when the only evidence before it pointed to a loss of majority status, and that it was entitled to withhold recognition thereafter pursuant to the "anticipatory withdrawal of recognition" line of cases. See, e.g., *Abbey Medical*, 264 NLRB 969 (1982), enfd. mem. 709 F.2d 1514 (9th Cir. 1983); *Burger Pits*, 273 NLRB 1001 (1984), enfd. sub nom. *HERE v. NLRB*, 785 F.2d 796 (9th Cir. 1986). In essence, the Respondent argues that, having announced on December 2 that it was withdrawing recognition, it was entitled to rely on the evidence existing at that time and to ignore any contradictory evidence that might be presented later. There is no merit in this contention.

347 NLRB at 975. This principle, which results in the union having until the contract expires to build up its support, figures in the present case.

Relevant Facts

The Respondent has admitted that it had recognized the Union as the exclusive bargaining representative of employees in a unit appropriate for collective-bargaining. More specifically, it has admitted that, during the period August 18, 2010, through May 7, 2015, the Union was the designated exclusive representative of employees in that unit. Respondent's answer also admits that it "withdrew recognition on May 8, 2015, after the expiration of the collective bargaining agreement." However, the Respondent asserts that it withdrew recognition lawfully, based on evidence it had received which proved that a majority of bargaining unit employees no longer wished the Union to represent them.

Specifically, in withdrawing recognition the Respondent relied on a petition, signed by 83 employees[1], which it had received on April 21, 2015. The petition began as follows:

> Union Decertification Petition
>
> WE, THE UNDERSIGNED, EMPLOYEES OF Johnson Controls, Florence facility, DO NOT WISH TO CONTINUE TO BE REPRESENTED BY THE United Auto Workers, LOCAL UNION ~~509~~ 3066 (Local ~~509~~ 3066) FOR PURPOSES OF COLLECTIVE BARGAINING OR ANY OTHER PURPOSE ALLOWED BY LAW. WE UNDERSTAND THIS PETITION MAY BE USED TO OBTAIN AN ELECTION SUPERVISED BY THE NATIONAL LABOR RELATIONS BOARD OR TO SUPPORT

[1] As noted below, an 84th employee signed the petition before the contract's expiration.

WITHDRAWAL OF RECOGNITION OF THE UNION.

(Capitalization as in original. The handwritten number "3066" appeared above the lined-out "509" in both instances.) Below this text were employee signatures and dates.[2]

The same day Respondent received the petition, it sent a letter to the Union. The letter, addressed to International Representative David Bortz and signed by Larry Boswell, the Respondent's U.S. Director of Operations, East Region, stated as follows:

> On April 21, 2015, Johnson Controls, Inc. received objective evidence that a majority of employees employed at the Florence, South Carolina plant within the unit defined in 11-RC-6736 no longer desire to be represented by the UAW. The objective evidence provided to Johnson Controls was an employee petition signed by a majority of employees. Therefore, effective upon expiration of the current labor agreement on May 7, 2015, Johnson Controls will no longer recognize the UAW as the legal representative of the workforce.
>
> We will continue to honor the collective bargaining agreement through the expiration date. However, our previously scheduled dates for bargaining a successor agreement are canceled.
>
> If you have any questions, feel free to contact me.

International Representative Bortz replied by letter dated April 22, 2015. It stated:

> I am in receipt of your letter dated April 21, 2015. The UAW has not received a petition or any verifiable evidence that a majority of employees have expressed not to be represented by our Union.
>
> Therefore, the Union demands to return to the bargaining table to negotiate a successor agreement. You have previously scheduled dates of April 27-30, 2015. We would expect that we resume bargaining on Monday, April 22, 2015.
>
> If you have any questions, feel free to contact me.

In an April 24, 2015 reply, the Respondent informed the Union that it would not provide the Union with its evidence and also declined the Union's request to resume bargaining. The Union then began an effort to counter the disaffection petition. Some prounion employees began asking other employees to sign authorization cards. The cards

[2] The complaint does not allege and the General Counsel does not argue that the Respondent provided any unlawful assistance in the preparation and circulation of the petition and the record would not support such a finding. I conclude that the petition constituted objective evidence that, on the respective dates they signed the petition, the signers did not want the Union to represent them.

included the following language:

> I,_____, authorize the United Auto Workers to represent me in collective bargaining.

Among the employees who signed such cards were seven who previously had signed the disaffection petition. These seven employees (and the date each signed a Union authorization card) are Kyle Robinson (May 3, 2015), Harry Lee Jefferson (May 4, 2015), Martha Rogers (May 8, 2015), John Smith (May 6, 2015[3]), McFadden (May 5, 2015), Johnny W. Smith (May 5, 2015), and Kenneth Waters (May 5, 2015). Thus, all but Rogers signed authorization cards before the Respondent withdrew recognition the Union.

On May 5, 2015, the Respondent received a second petition with the same wording quoted above and bearing the signature of one employee. In effect, it added one name to the existing disaffection petition.

Also on May 5, the Respondent sent the Union another letter. It stated, in part:

> We have not received any evidence from the union or otherwise that the union continues to have the majority support of the bargaining unit employees. In the absence of such evidence, the Company will withdraw recognition of the union upon expiration of the contract as previously indicated.
>
> The Company remains willing to meet about other matters through the expiration of the contract.

The Union replied that it did enjoy majority support and repeated its request to negotiate. On May 7, 2015, the Respondent sent the Union a letter stating as follows:

> We are in receipt of your May 6, 2015 letter. We have objective evidence of the union's loss of majority support - a petition signed by a majority of the bargaining unit employees. While we acknowledge the union's request to meet, we are not willing, as we previously advised in our April 24, 2015 letter, to share the names of the employees who signed the petition.
>
> You indicate that despite the evidence the Company has received from our employees, the union has evidence it has not lost majority support. However,

[3] Smith could not recall exactly when he signed the Union authorization card but the card itself bore the handwritten date 5–15–15. Although Smith recognized the signature as his own, he testified that the "5–5–15" in the date box did not look like his handwriting. However, Smith mentioned that he had a "problem seeing." When he looked at the date on the card, initially he misread it as "5–15–15" rather than "5–5–15." No other evidence suggests that Smith signed the authorization card on a date other than May 5, 2015. The handwritten date does not appear markedly different from other writing on the union authorization card. In view of Smith's vision problem, I do not attach great weight to his testimony that the date did not look like his handwriting. In the absence of evidence to the contrary, I find that Smith signed the card on May 5, 2015.

> while the employees provided the Company with their evidence, to date the union has not provided any substantiated evidence supporting its position. Absent contrary evidence, we must rely upon the evidence in our possession and proceed as previously indicated.

The collective-bargaining agreement expired on May 8, 2015, and the Respondent withdrew recognition from the Union.

As noted above, the government does not claim that the petition had been tainted by unfair labor practices. Rather, the General Counsel argues that when the seven employees signed union authorization cards, they effectively removed their names from the disaffection petition, making it insufficient to support a withdrawal of recognition. If the signatures of these seven employees are disregarded, then the total number of petition signers falls below half of the number of employees in the bargaining unit. A disaffection petition signed by less than half of the bargaining unit does not, by itself, prove that the Union had lost majority support.

Here, timing becomes important. The seven employees did not sign union authorization cards until early May 2015 so, when the Respondent received the petition on April 21, no action had called into question the validity of any signatures. Thus, when the Respondent received the petition, it did constitute proof that a majority of bargaining unit employees did not wish to be represented by the Union. If a collective-bargaining agreement had not been in effect, the Respondent lawfully could how withdrawn recognition after it received the petition.

However, the existence of a current collective-bargaining agreement barred the Respondent from withdrawing recognition until that contract expired. Accordingly, the Respondent did no more than notify the Union of its intent to withdraw recognition.

As noted above, under *Levitz*, the Respondent must prove a lack of majority support *at the time it withdraws recognition*, and the opportunity to withdraw recognition would not come until May 8. Therefore, when the Union received the Respondent's April 21 letter, it had about 2 weeks before the figurative "game over" buzzer would sound. During that time, it collected authorization cards signed by a number of bargaining unit employees, including the seven who had signed the disaffection petition. Only the cards signed by the seven petition signers are relevant here because employees who did not sign the disaffection petition are presumed to support the Union.

The government contends that the Union authorization cards signed by the seven petition signers invalidated their earlier signatures on the petition, making it insufficient proof that the Union had lost its majority support. Thus, during oral argument, the General Counsel stated:

> Respondent relied solely on an employee disaffection petition purportedly signed by 83 out of 160 unit employees. Seven of these unit employees who signed the disaffection petition subsequently signed a union authorization card

> prior to May 8th, which precluded Respondent from relying on their signatures on the petition pursuant to *HQM of Bayside*, 348 NLRB 758 (2006), and *Fremont Medical Center*, 354 NLRB 453 (2009).

To prove that seven of the petition signers had changed their mind, the government introduced into evidence the union authorization cards they had signed. The General Counsel argues that the authorization cards effectively removed the 7 names from the disaffection petition, thereby dropping the total number of signers to 76, or less than half of the 160-employee bargaining unit.

The government's case therefore turns on whether signing the union authorization cards had the effect of nullifying the employees' earlier signatures on the disaffection petition. All of the cards bore the same straightforward language, quoted above, that the signer authorized "the United Auto Workers to represent me in collective bargaining." These words directly contradict the language on the disaffection petition, that the signers "DO NOT WISH TO CONTINUE TO BE REPRESENTED BY THE United Auto Workers."

The authorization cards certainly constitute evidence suggesting that the signers had changed their minds. See *HQM of Bayside*, above. However, the testimony of some of the card signers indicates that they did not understand the significance of signing the authorization card and that they remained opposed to union representation. To what extent should I consider such testimony, and what weight should I give it?

In deciding how this testimony should be treated, it is helpful to consider exactly what the General Counsel must prove to establish that Respondent failed and refused to bargain in good faith, in violation of Section 8(a)(5), when it withdrew recognition from the Union. There is obviously a refusal to bargain - the Respondent admits that it withdrew recognition from the Union - so the inquiry necessarily focuses either on the existence of a duty to bargain or on the Respondent's good faith. Whether or not a duty to bargain existed depends on an objective fact, namely, that a majority of employees continued to support the Union. Whether or not the Respondent acted in good faith presents a subjective question relating to the Respondent's state of mind.

Before *Levitz*, the Board applied a subjective test.[4] The lawfulness of the withdrawal of recognition did not turn on whether a majority of bargaining unit employees wanted union representation but rather depended on the employer's state of mind. The *Levitz* decision changed that standard. Thus, in *Heritage Container, Inc.*, 334 NLRB 455 (2001), the Board explained:

> In *Levitz*, 333 NLRB No. 105 (2001). . .the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith

[4] This discussion assumes that no circumstance, such as a current collective-bargaining agreement) barred a withdrawal of recognition, and also assumes that the employer had not committed unfair labor practices which prompted or contributed to the employees' disaffection.

> doubt of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees."

334 NLRB 455, citing *Levitz Furniture Co.*, 333 NLRB at 717. A cursory reading of the *Levitz* decision might leave the impression that the lawfulness of the withdrawal of recognition depends on an actual fact external to the employer's decision-making process. Thus, the decision stated that "unless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally." *Levitz Furniture Co.*, 333 NLRB at 725. The Board also stated:

> [W]e hold that an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.

Id. At first glance, these quoted passages might seem to suggest that the lawfulness of the withdrawal of recognition turns solely on an objective, ascertainable fact external to the employer's decision-making process: Whether or not the Union enjoyed majority support at the time the employer withdrew recognition. However, the actual analysis is more complicated.

If the existence or nonexistence of majority support were the sole deciding factor then, logically the employer would be allowed to present all relevant evidence on this point, regardless of when it obtained the information, that is, whether it obtained the information before or after the withdrawal of recognition. Under such a totally objective standard, the employer's knowledge at the time it withdrew recognition would not matter but only the objective fact that the union had lost majority support. However, under *Levitz*, the lawfulness does not turn on the objective fact alone but rather on whether the employer can prove it. Moreover, the Board will only allow the employer to base this proof on information the employer *actually relied upon* when it decided to withdraw recognition. See, e.g., *Highlands Regional Medical Center*, 347 NLRB 1404 (2006).

Thus, the *Levitz* decision provides a framework for deciding both the existence of a bargaining duty and the good faith of the employer. As to the existence of a bargaining duty, *Levitz* presumes that an incumbent union continues to enjoy majority support but allows the employer to rebut that presumption. To address the subjective question, an employer's good faith in withdrawing recognition, the Board limits the evidence an employer can use to rebut the presumption of an incumbent union's continuing majority status: The employer may only use evidence it actually possessed and considered when it made the decision to withdraw recognition. If such evidence does not rebut the presumption, then the employer's decision to withdraw recognition could not have been in good faith.

The *Levitz* framework thus provides a way to decide the two intertwined issues - the existence of a bargaining duty and the employer's good faith - at the same time. The unusual

facts of this case, however, complicate the use of this framework. The disaffection petition, on its face, carried the Respondent's burden of rebutting the presumption that the incumbent Union continued to enjoy majority support. When the government introduced the Union authorization cards, it was attacking the sufficiency of the objective evidence which Respondent relied upon, but doing so with evidence the Respondent had not possessed.

In other words, the union authorization card evidence relates to the objective question, whether a bargaining duty still existed, rather than to the subjective question of whether the Respondent acted in good faith when it withdrew recognition. Thus, there appears to be an asymmetry: The Board only allows the Respondent to prove the objective fact - the Union's loss of majority support - using information the Respondent actually had possessed, but it permits the General Counsel to challenge that proof with evidence the Respondent had not possessed.

For reasons discussed above, the government's Union authorization card evidence does not call into question the Respondent's subjective good faith because Respondent had no reason to doubt that the signatures on the disaffection petition reflected the signers' rejection of Union representation. Based on the record, I find that Respondent acted in good faith when it relied on the disaffection petition because it did not know about employees signing union authorization cards and reasonably could not have known; the Union did not provide this information.

The General Counsel's evidence that certain petition signers later signed Union authorization cards can prove, at most, that Respondent made a mistake in relying on the disaffection petition. But whether Respondent actually made such a mistake depends on the intent of the employees when they signed the union cards. By introducing the union authorization cards and by calling many of the signers as witnesses, the government has opened the door for cross-examination concerning their intent. Fairness requires a careful consideration of this testimony.

Moreover, it is important that this proceeding do justice and neither play nor create the appearance of playing "gotcha." Regardless of whether the Union had any legal duty to inform the Respondent of the authorization cards, its silence about them left the Respondent with no reason to doubt the validity of the signatures on the disaffection petition.

The Union clearly could have furnished this information before the Respondent made the decision to withdraw recognition and the information might well have affected that decision. Thus, 2 days before it withdrew recognition, the Respondent's May 5, 2015 letter to the Union stated:

> We have not received any evidence from the union or otherwise that the union continues to have the majority support of the bargaining unit employees. In the absence of such evidence, the Company will withdraw recognition of the union upon expiration of the contract as previously indicated.

These words clearly imply that Respondent remained open to considering evidence that contradicted the disaffection petition and that such evidence might change its decision to withdraw recognition. When it received this letter on May 5, the Union did have such evidence, the authorization cards, but did not tell the Respondent.

Instead, the Union waited until the Respondent withdrew recognition on May 8 and then, on that same date, filed the unfair labor practice charge in this case. The government then prosecuted the Respondent for taking an action which appeared to be lawful based on the information Respondent possessed, and only appeared unlawful in light of the information which the Union had withheld.

Certainly, it is well established that an employer "acts at its peril" when it chooses to withdraw recognition rather than petitioning for the Board to conduct an RM election. However, I do not believe that the Board intends this principle to be extended so far that it smiles on "gotcha."

Ultimately, though, the most important interest to be protected here is the employees' right to be represented by representatives of their own choosing or to refrain from having such representation. If a majority of employees did support the Union at the time Respondent withdrew recognition, the harm must be undone. To determine whether the petition signers who later signed union authorization cards had changed their minds, I will weigh their testimony.

Employee Harry Lee Jefferson testified that he received the Union authorization card at the end of a 12-hour shift and "really didn't know really exactly what it was." Jefferson's testimony during cross-examination included the following:

> Q. On May 8, did you support decertifying the Union?
> A. Yes.

Like Jefferson, employee John A. Smith signed the disaffection petition and then later signed a union authorization card. During cross-examination, after acknowledging that he had signed the disaffection petition, Smith testified as follows:

> Q, Did you understand that the Company would rely upon that [petition] and withdraw in recognition?
> A. Yes, sir.
>
> Q. On May 8th when the Company withdrew recognition, did you still intend for the Company to rely upon that?
> A. Yes, sir.

Another employee named John Smith (and referred to as "Johnny Smith") also signed the disaffection petition and later signed a union authorization card. He testified that, when the Respondent withdrew recognition from the Union, he supported that action notwithstanding that he had signed a union authorization card.

Employee Morris McFadden signed the disaffection petition and then later signed a union authorization card. From McFadden's testimony on cross-examination, I conclude that he did not support the Union when he signed the disaffection petition and did not change his mind later. Rather He signed the Union authorization card simply to "go along" and avoid conflict with other workers. On cross-examination, McFadden testified, in part, as follows:

> Q. Okay You never intended to back out of your signature to decertify the Union, did you?
> A. No, sir
>
> Q. And on May 8th, when the Company withdrew recognition, you supported the Company taking that action?
> A. Yes, sir.

Based upon my observations of the witnesses during the hearing, I conclude that Harry Lee Jefferson, John A. Smith, Johnny Smith, and Morris McFadden gave reliable testimony. The record affords no reason to doubt Jefferson's testimony that he received the Union authorization card at the end of a 12-hour shift and "didn't know really exactly what it was." Crediting his testimony, I conclude that Jefferson did not understand that signing the card could nullify his signature on the disaffection petition. Further, I find that Jefferson continued to oppose representation by the Union at the time Respondent withdrew recognition.

Crediting Morris McFadden's testimony, I find that when he signed the Union authorization, he did not intend to rescind signature on the disaffection petition. Similarly, based on the credited testimony of John A. Smith and Johnny Smith, I find that they did not intend to negate their signatures on the disaffection petition. Further, I conclude that Jefferson, McFadden, and the two Smiths remained opposed to union representation at the time Respondent withdrew recognition.

However, I do not find that another employee, Kyle Robinson, remained opposed to union representation at the time Respondent withdrew recognition. Robinson had signed the deauthorization petition and later signed a union authorization card. Based upon my demeanor observations, I credit Robinson's testimony, but that testimony does not establish that he remained opposed to Union representation after he signed the union authorization card. Therefore, I conclude that Robinson's signature on the union authorization card resulted from and reflected a change in his attitude about union representation.

Another employee, Kenneth Waters, signed the disaffection petition but later signed a union authorization card. Waters did not testify. In the absence of evidence that Waters continued to oppose union representation after signing the union authorization card, I conclude that Waters had changed his position on the issue of union representation.

In sum, I find that Waters and Robinson changed from being against union representation to supporting it. Therefore, their signatures on the disaffection petition cannot

be counted in determining whether the Union still enjoyed majority support.

Employee Martha Rogers signed a union authorization card on May 8, which was after the Respondent withdrew recognition from the Union. Therefore, her signature on the disaffection petition remained in effect at the time recognition was withdrawn and will be counted in determining whether a majority of bargaining unit employees then wanted Union representation.

For reasons discussed above, I find that employees Jefferson, McFadden, John A. Smith, and Johnny Smith continued to oppose union representation notwithstanding that they signed union authorization cards. Therefore, their signatures on the disaffection petition should be counted.

The total number of signatures on the disaffection petition increased to 84 on May 5, 2015, when the Respondent received a page bearing one additional signature. However, I have found that Waters and Robinson changed from opponents to supporters of union representation. Because their names cannot be counted, I conclude that the disaffection petition constitutes proof that, at the time Respondent withdrew recognition, 82 of the 160 bargaining unit employees opposed representation by the Union.

Because a majority of bargaining unit employees did not want to be represented by the Union, the Respondent lawfully withdrew recognition.[5] Therefore, I recommend that the Board dismiss the complaint in its entirety.

Conclusions of Law

1. The Respondent, Johnson Controls, Inc., is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and its affiliated Local Union No. 3066, are, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[6]

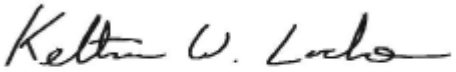
[5] In view of this conclusion, based on the validity of 82 signatures on the disaffection petition, it is not necessary to consider Respondent's argument that it possessed and relied upon other information, consisting of oral statements by employees, when it made the decision to withdraw recognition.

[6] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 16, 2016



Keltner W. Locke
Administrative Law Judge